FILE COPY

Office - Supreme Court, U. S
FILED
OCT 16 1937
CHARLES ELMORE CROPLEY
CLERK

No. 36 October Term, 1937

In the

Supreme Court of the United States

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania

Petitioner

vs.

ISRAEL BINENSTOCK, individually, and as surviving partner of the partnership firm of SWINGER AND BINENSTOCK, and BESSIE SWINGER, individually, and as executrix of the Estate of Benjamin Swinger, deceased.

Respondents

BRIEF OF RESPONDENTS

ROBERT T. McCRACKEN
C. RUSSELL PHILLIPS
ISADORE KATZ
Attorneys for Respondents
1510 Morris Building
Philadelphia

M 6

INDEX

	Page
I. OPINIONS BELOW	1
II. JURISDICTION	1
III. STATEMENT OF THE CASE	1
IV. SUMMARY OF ARGUMENT	2
V. ARGUMENT	4
1. INTRODUCTION	4
2. THERE IS NO PRACTICAL DISTINCTION IN PENNSYLVANIA BETWEEN A JOINT OBLIGATION AND A JOINT AND SEVERAL OBLIGATION	7
3. UNDER THE FEDERAL CASES THE SET-OFF SHOULD BE ALLOWED	14
4. UNDER THE PENNSYLVANIA DECISIONS THE SET-OFF WOULD BE ALLOWED	21
5. THE FEDERAL COURTS WILL GIVE WEIGHT TO STATE COURT DECISIONS IN DECIDING A QUESTION OF GENERAL LAW	25
6. ALLOWANCE OF THE SET-OFF IS IN ACCORDANCE WITH ORDINARY FAIRNESS	36

INDEX OF CASES

	Page
Black & White Taxicab and Transfer Company v. Brown & Yellow Taxicab and Transfer Company 276 U.S. 518	28
Cochran v. Cutter, 18 Pa. Super. Ct. 282	24
Childerston, et al v. Hammon, 9 S. & R. 68	22
Gray v. Rollo, 18 Wallace, 629	20
Miller v. Reed, 27 Pa. 244	8
Roelker v. Bromley-Shepard Co. Inc. et al, 73 Fed. 2d 618, C.C.A. 1, 294 U. S. 713	16
Scott v. Armstrong, 146 U.S. 499	18
Sim v. Edenborn, 242 U.S. 131	32
Stewart v. Coulter, 12 S. & R. 252	22
Swift v. Tyson, 41 U.S. 1	25
Trainor Co. v. Aetna Casualty & Surety Co. 290 U.S. 47	33

INDEX OF TEXTS

Conflict of Laws, Vol. 1, page 25 sec. 3.5	27
25 Corpus Juris, page 846, sec. 185	32
37 Harvard Law Review, 49	26
1 Williston on Contracts, Sec. 316	11, 15

INDEX OF PENNSYLVANIA STATUTES

	Page
Act of 1830 P.L. 277 Sec. 1; 12 PS Sec. 801	42
Act of 1830 P.L. 277 Sec. 2; 12 PS Sec. 802	42
Act of 1848 P.L. 536 Sec. 3; 12 PS Sec. 805	43
Act of 1848 P.L. 536 Sec. 5; 12 PS Sec. 806	43
Act of 1877 P.L. 52 Sec. 1; 12 PS Sec. 807	44
Act of 1862 P.L. 167 Sec. 1; 59 PS Sec. 131	44
Act of 1862 P.L. 167 Sec. 5; 59 PS Sec. 135	45
Act of 1915 P.L. 18 Sec. 15; 59 PS Sec. 37	7
Act of 1923 P.L. 981 Sec. 1; 12 PS Sec. 685	45

BRIEF OF RESPONDENTS

I. OPINIONS BELOW

The opinion of the District Court (KIRKPATRICK, *J.*) appears at pages 8-11 of the record and is reported in 18 Fed. Supp. 262.

The affirming opinion of the Circuit Court of Appeals for the Third Circuit appears at pages 18-19 of the record and is reported in 88 F (2d) 474.

II. JURISDICTION

This Court granted a writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit.

III. STATEMENT OF THE CASE

Petitioner's statement of the case is correct except that it refers (p. 3) to three of the notes as "joint notes." They were partnership notes signed "Swinger & Binenstock" (R. 5). The word

"joint" has had and still has numerous meanings by implication of law. The question in this case is whether notes signed "Swinger & Binenstock" may be set off against the individual deposits of Swinger and Binenstock. The result should not be assumed in advance by the use of the equivocal word "joint."

IV. SUMMARY OF ARGUMENT

Respondents contend that under the law of Pennsylvania the individual deposits of the partners in the firm of Swinger and Binenstock would be set-off against the firm indebtedness on the notes. The National Banking Act does not cover the subject, but provides generally for "ratable distribution" of the assets of an insolvent national bank. The rights of depositors are, therefore, matters of local law. However, even if the Court should consider that a separate body of federal decision law should be built up on this subject, it should be in accord with the Pennsylvania rule and the set-off should be allowed. Quite a number of decisions in the federal courts incline that way and the latest decision in the First Circuit defi-

nitely so holds with respect to a joint obligation. The fact that national banks are liquidated by a central authority managed from Washington should not be allowed to overshadow the larger fact that depositors do not get their rights from Washington. These rights arise by reason of local law. These laws sometimes vary according to the locality. The local law, however, should not be abolished merely to make liquidation easy.

The modern idea of a joint obligation is quite different from the original conception. At one time it was the law that all persons on a joint obligation had to be sued and served with process at once. Ordinary ideas of justice today have generally made it possible to sue anyone of several joint obligors on a joint obligation and proceed against each severally. In Pennsylvania this is provided for by statute. Only the individual intended to be held needs to be served and the judgment is against him alone. There is, therefore, no substantial difference between a joint and a joint and several obligation.

Lastly it is in accord with the ordinary requirements of fairness that the set-off should be allowed. No technical rule nor remnants of any ancient doctrine should be allowed to stand in the way of this fair result.

V. ARGUMENT

1. INTRODUCTION

Much of Petitioner's brief is not open to dispute. The Respondents do not contend that Congress, if it chooses, may not provide by statute when set-off shall be allowed in liquidating a national bank. The Respondents' position is that Congress has not done so. The pertinent statute* provides only that there shall be a "ratable dividend." Who may be a creditor and to what extent is not covered at all. To extend in the statute the provisions necessary for such a determination would require a re-statement of a large body of law. The determination of who are creditors and to what extent depends on the law of the locality. Many facts may be conceived which would establish a creditor position in one state and not in another. There can no more be uniformity upon

*Section 5236 U.S.R.S. (U. S. C. Title 12 Sec. 194); Petitioner's Brief, p. 43.

this subject than upon many others. There might be uniformity upon the single subject of set-off if all the states' legislatures so required. They have not done so and there are differences of result in different states.

Congress might have provided by statute the liabilities of the partners on a note signed in the partnership name, but it has not done so. While it is true the uniform partnership act in force in Pennsylvania provides that the liabilities of partners shall be joint, neither the partnership act nor Congress have defined the nature of joint liability. That is left to the general law of the respective states. As will be shown below, there is really no difference in Pennsylvania between a joint and a joint and several obligation.

Congress might also have required uniformity upon the question of set-off in the liquidation of national banks but it has not done so. Consequently, there may be lack of uniformity but that lack has not yet appeared. All the cases on the subject in the liquidation of national banks arrive at the same result upon the point involved in this case.

At page 21 of his brief, Petitioner cites a case from Indiana and urges the adoption of the Indiana rule as the correct one. There is no reason why it should not be the rule in Indiana. But an Indiana case goes no further to establish a uni-

form federal rule than do the Pennsylvania cases which reach an opposite result.

As will be shown below the decisions of the federal courts are in accord with the decision of both courts below in this case. But if this were not so, it might well be questioned whether there should be a general uniform rule to establish the right of set-off in national bank liquidations. Banks are not created to be liquidated and there is no reason why the convenience of the Comptroller of Currency should for no other reason than his convenience prevail over other considerations. The organization of national banks necessarily should be uniform because the right to operate is derived from a single source. But the property rights and contractual considerations which determine who shall be a creditor and to what extent originate in local law. If local law is not recognized, two banks, side by side will liquidate in different ways. Local uniformity rather than national uniformity is desirable in such a case.

Realizing that local law is the primary origin of creditor rights against a national bank Congress has not attempted to replace that law with a whole body of law applicable only to national banks. Even the provision for a "ratable dividend" is not peculiar to the liquidation of national banks. Those words merely announce a generally accepted principle of fairness.

2. THERE IS NO PRACTICAL DISTINCTION IN PENNSYLVANIA BETWEEN A JOINT OBLIGATION AND A JOINT AND SEVERAL OBLIGATION

The Act of the Pennsylvania legislature, 1915 P.L. 18 Section 15; 59 PS Section 37 provides as follows:

> "All partners are liable—
>
> (a) Jointly and severally, for everything chargeable to the partnership under sections thirteen and fourteen.
>
> (b) Jointly, for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

Section (b) above referred to covers ordinary partnership debts. This act, however, does not provide what the nature of joint liability is. Joint liability has been the subject of considerable legislation in Pennsylvania just as it has in most other states.

Originally a joint obligation was subject to more or less arbitrary rules. For instance all of the joint debtors had to be sued at once, or else those not sued were released. Indeed at an early date, it was necessary to sue all the parties and get

service upon them unless any absent were outlawed. There was also the rule that the release of one joint obligor released all of them. All of these rules were very cumbersome and they have all been changed by statute in Pennsylvania. The Act of 1830 P. L. 277 Section 1; 12 PS Section 801 (Appendix p. 42) makes it possible in Pennsylvania to sue any joint obligor without making service upon any of his co-obligors. This may be done without showing that the others could not be served. In other words a plaintiff may sue joint obligors separately. As a matter of common practice the others are ordinarily named in the caption of the case, but those not served are not bound and separate suits may be brought against the others at a later date. While the statute referred to is somewhat ambiguous in that it refers to actions against "joint and several obligors, co-partners * * * " it was early decided, however, that the act does apply to joint obligations.

Miller v. Reed, 27 Pa. 244 (1856)

Without going into the facts of this case, it is sufficient to note that if the obligation were joint the defense presented would be good, whereas if there were no difference between a joint and several note the defense would not be good. The court held that in Pennsylvania there was no longer any real difference between a joint and a

joint and several obligation. At page 248, Justice WOODWARD of the Supreme Court of Pennsylvania stated:

> "The terms of this legislation, though limited to undertakings that are 'joint and several', are applicable to contracts that are joint and not several: 6 Wh. 268; 5 Barr 401. If then, neither an action and recovery against one joint debtor, nor a confession of judgment by one, nor the death of one after judgment, works a discharge of the other, what difference remains, so far as regards the remedy, between joint contracts and contracts joint and several? The distinction always had regard to remedies. The parties are bound according to the tenor of the instrument to which they put their signatures, and it is evidence against each of them; but the discharge of one by taking action against the other is the peculiarity which the statutes have taken away."

Section 2 of the Act of 1830 above referred to (Appendix p. 42) provides that one or more of several obligors may confess judgment and this will not bar recovery against the others. The Act of 1848 P. L. 536 Section 3; 12 PS 805 provides that where a judgment is obtained against two or more partners or joint obligors, the death of one of them shall not discharge his estate. The Act of

1848 P. L. 536 Section 5; 12 PS Section 806 (Appendix p. 43) provides that where a judgment is secured against one or more of several partners or joint obligors, such action shall not be a bar to a recovery in a subsequent suit against other obligors who may not have been joined in the suit. The Act of 1877 P. L. 52 Section 1; 12 PS Section 807 (Appendix p. 44) is to the same effect where judgment is secured by default.

The Act of 1862 P. L. 167 Section 1; 59 PS Section 131 together with Section 5 of the same Act 59 PS Section 135 (Appendix pp. 44-5) provide that a creditor may make a compromise with one of several joint debtors or partners and that such a compromise shall not discharge the others.

The Act of 1923 P. L. 981; 12 PS Section 685 (Appendix p. 45) provides that an action started against joint defendants may be changed to an action against less than all of the defendants.

All of these statutes taken together remove every distinction which ever existed between a joint obligation and a joint and several obligation.

In drafting the uniform partnership act the Commissioners appreciated the fact that in some jurisdictions there was no difference between a joint and a joint and several obligation. They inserted the following Commissioners' note after Section 15 of the Uniform Partnership Act which is the section referred to above. This note reads in part as follows:

"In many of these states, however, the results of joint liability as known to the common law have been modified by statute and decision. The extent of the modification varies."

* * *

"The purpose of the statutes in those states which have made the liability joint and several was to effect certain procedural results, rather than to affect the substantive law. Where, therefore, a state has already declared the liability to be joint and several, then the principle of uniformity would not be affected by that state so altering this paragraph as to make the liability joint and several, as this change would affect only the procedural law and this act is one to make uniform the substantive law of partnership."

The Pennsylvania statutes above referred to have not been repealed but are still in force and effect.

Even if there were no such state statutes the difference between a joint and a joint and several obligation has been purely one of procedure except in so far as acts in the nature of a release were indulged in.

1 Williston on Contracts, Sec. 316

"The idea (of a joint obligation) ceases to be practical when a judgment has been ren-

dered against joint contractors and the plaintiff wishes to satisfy that judgment."

It is submitted that to have all this litigation over the question of set-off is unnecessary in the case of an obligation arising under the laws of the Commonwealth of Pennsylvania. The brief of the Petitioner would seem to admit by very clear inference that if the liability of the partners constituting the firm of Swinger and Binenstock on the notes here in question were both joint and several, the set-off requested would surely be allowed. There cannot be any doubt of this point. The whole argument is based on the assumption that the liability of the partners is joint and not several. As a matter of fact the entire argument simply turns upon an assumed definition of the word "joint." In Pennsylvania a joint obligation most assuredly possesses all the aspects of a joint and several obligation and there is no difference whatever between the two. It is further submitted that since Congress has not set up a body of commercial law relating to national banks (assuming that it could do so) this Court should not impose upon the parties a relationship which did not in fact or in law exist based purely upon some definition of the word "joint" maintaining in Indiana or some other jurisdiction. The fact that the laws of the states may not be uniform in the definition

of the word "joint" as applied to obligations is a circumstance which cannot be escaped. There are many points of law upon which the states have adopted different rules. The tendency, however, is very clearly away from the dangers inherent in the old common law rules applicable to joint obligations.

The importance of considering the Pennsylvania rule as between clients doing business entirely in Pennsylvania is very practical. In Pennsylvania a bank can lend to an utterly irresponsible partnership, provided it be assured of the responsibility of only one of the partners. The partnership firm of Swinger and Binenstock was not irresponsible but the partnership notes were not secured at the bank by partnership assets. The bank, however, would certainly consider the notes perfectly secured, because all the time the bank had on deposit moneys in the name of one of the partners in sufficient amount to more than pay all the partnership obligations. As a practical matter, it is a fact that the bank was secured by the individual deposits of the partners. Conversely, it is just as true that the partners never for a moment considered that they were straining relations with the bank in asking for loans upon the notes. They knew that they had more than sufficient security and that this security could be reached by the bank

even though it stood in the name principally of one of the partners.

It follows that as a matter of practical fact both the bank and the partners as well as the partnership firm considered that the possibility of offset furnished security to the bank and risk to the individual deposits. It would be a most extraordinary thing if this Court should say that the thing which all these business people must have assumed cannot be so when the action raising the question is brought in the federal courts after the bank has failed.

A brief discussion of the cases, both federal and state on the general question of set-off follows:

3. UNDER THE FEDERAL CASES THE SET-OFF SHOULD BE ALLOWED

The bill of complaint is filed to take advantage of the rule recognized in the federal courts as well as in the Pennsylvania courts that equitable set-off will be allowed under the circumstances recited because, the bank being insolvent, it would deprive the plaintiffs of a remedy they had before the failure, not to allow the set-off.

The theory is that while the obligation of the partnership to the bank is a joint obligation, liability therefor is both joint and several. In other words, if the bank sues the partnership it may secure a joint judgment, but at that point the lack of mutuality, if any exists, ceases. The partners are individually liable each for the entire amount of the partnership indebtedness in execution upon the judgment against the firm. They may even be sued separately. Therefore, as a matter of fact, the individual partners are liable severally to the bank on the partnership obligation. Under these circumstances, it would be inequitable to allow the bank to enforce its claims and not allow the set-off. This follows entirely apart from the Pennsylvania statutes affecting joint obligations.

1 Williston on Contracts, Sec. 316

> "The idea (of a joint obligation) ceases to be practical when a judgment has been rendered against joint contractors and the plaintiff wishes to satisfy that judgment."

Therefore, if the bank brought an action against the firm on these notes, it could claim in execution the assets of the individual partners. Suppose then the individual partners should bring suit against the bank for their individual deposits and secure judgments. The case would then be one

of complete and perfect mutuality. The individual partners could then come into equity and demand an offset of the claims. The only reason this procedure cannot take place at law is by reason of the insolvency of the bank making it impossible for the individual depositors to bring suit to recover their deposits. It is inequitable that the bank should be permitted to secure rights which it would not otherwise possess by reason of its own insolvency and consequent default.

The cases generally allow an equitable set-off at the outset under these circumstances where one of the debtors is either insolvent or a non-resident.

The precise case has arisen in the First Circuit and the equitable set-off has been allowed. This is the only case in the federal courts directly in point.

Roelker v. Bromley-Shepard Co., Inc. et al
73 Fed. 2d, 618 (1934) C.C.A. 1

Certiorari denied, 294 U. S. 713

In this case a corporation and an individual were obligated to a national bank on a joint note. When the bank closed both the corporation and the individual had deposits at the bank in excess of the note. A bill in equity was brought to compel the offset. First, a motion to dismiss was filed and overruled. The case went to trial on an agreed statement of facts, and a final decree was entered

allowing the offset. This decree was appealed by the receiver of the bank to the Circuit Court of Appeals for the First Circuit and the decision was affirmed.

All of the arguments here advanced by the petitioner were advanced in that case. Reference was first made to the provisions of the National Banking Act (12 U. S. C. A. Sec. 194) which require a ratable distribution of the bank's assets among its creditors. It was contended that this precluded the possibility of set-off. This argument, many years ago, was rejected by this Court in a case which will be referred to below. In the Bromley-Shepard case the Circuit Court of Appeals for the First Circuit states, at page 619:

> "We do not think Congress intended by the National Bank Act to deprive depositors of the right of equitable set-off when justice requires it. The language of the court in Scott v. Armstrong, *supra,* in discussing this statute, is applicable to the situation here:"

Upon the merits, the same court stated:

> "(2) Conceding that at law, and generally in equity, a claim of one of two joint obligors cannot be set off against the joint debt, it is well established that, where justice requires, and there is no adequate remedy at law, a court of equity under such circumstances will

order a set-off, and a bill in equity to compel such set-off is a proper form of remedy."

* * *

"(4) Under the circumstances of this case, we think that justice requires that so much of the deposit of the Bromley-Shepard Company, Inc., in the insolvent bank as was necessary to pay the joint note, should be set off against the corporate note of the Bromley-Shepard Company, Inc., though the note was also signed by the treasurer of the corporation as a comaker."

This Court denied a petition for certiorari (294 U. S. 713). The only change in the authorities since then is the decision of the case at bar in accord.

Scott v. Armstrong, 146 U. S. 499 (1892)

In this case a national bank became insolvent and its assets were taken over by a receiver. Upon the date of the insolvency it held a note against a depositor who had a deposit at the bank. Because the note was not due at the date of insolvency, it was contended that the set-off should not be allowed and that in any event set-off was not allowable under the provision of the National Banking Act providing for a ratable distribution of the assets of a closed bank. Chief Justice FULLER, in

an opinion allowing the set-off, dealt with this argument at page 510:

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

and at page 511:

> "We are dealing in this case with an equitable set-off, but if on June 20 the note had matured and each party had a cause of action capable of enforcement by suit at once, upon the argument for the receiver the legal set-off would be destroyed just as effectually as it is contended the equitable set-off is. We cannot believe Congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank."

The question of allowing a joint claim to be set off against the separate claims of the joint debtors had been previously dealt with by way of dictum by this Court.

Gray v. Rollo, 18 Wallace, 629 (1873)

In this case the facts were as follows: The insolvent claimant was a fire insurance company. It held notes on which Moses Gray and one Gaylord were jointly liable. It owed money upon a fire loss, not to Moses Gray individually, but to a partnership consisting of Moses Gray and his brother Franklin Gray. Moses Gray attempted by a bill in equity to compel the insurance company to set off the amount due on the policies to Gray Brothers against the joint obligation of himself and Gaylord. He alleged in his bill that his brother Franklin assented to and authorized the appropriation of half of the amount due on the policies to the extinguishment of his liability upon his joint note to Gaylord, but this Court apparently considered that this allegation was unimportant. This Court distinguished from the facts before it a number of other cases, among them, *Tucker v. Oxley,* 5 Cranch, 34. At page 634, in the opinion in Gray v. Rollo, Justice BRADLEY says:

> "But the case of Tucker v. Oxley will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt,

but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which the bankrupt had against Tucker."

It is clear that under the federal decisions the set-off should be allowed.

4. UNDER THE PENNSYLVANIA DECISIONS THE SET-OFF WOULD BE ALLOWED

The district judge stated (R. 9):

"The law of the State of Pennsylvania if applicable would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. *Stewart v. Coulter,* 12 S. & R.

252; *Cochran v. Cutter,* 18 Pa. Sup. Ct. 282. See also *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477."

Childerston, et al v. Hammon, 9 S. & R. 68 (1822)

In this case an action was brought, upon a single bill, against two defendants jointly. The defendants proved that the plaintiff did not own the action but that it was owned by a third party, named John Hammon, and that the action was being brought for his benefit. The defendants further proved that John Hammon was indebted to one of the defendants in a sum greater than the amount due upon the single bill. The trial court rejected this evidence. This decision was reversed and a new venire ordered upon the theory that if these facts were true the set off should be allowed.

Stewart v. Coulter, 12 S. & R. 252 (1825)

In this case an action was brought upon a claim by Stewart against two joint defendants, Coulter and Day. The trial court allowed as an offset a claim by Coulter alone against Stewart. The action was brought in the Supreme Court sitting at *nisi prius.* Upon motion for a new trial the trial judge stated, at page 253:

"At the trial, my opinion was, that the indebtedness of the plaintiff to one defendant

was, of itself, unless there was some superior equity in a third person, a subject of set-off by that defendant, although he had been sued with others, and might be set off on the trial under our act of assembly, which has been always considered as more comprehensive than the British statutes of 2 Geo. II, Ch. 22, and 8 Geo. II, Ch. 24. That opinion has not been changed, and is unchangeable; for if the very able arguments of the counsel of the plaintiffs could not change it, it cannot be shaken."

Justice GIBSON filed a separate opinion in which he states as follows:

"For myself, I cannot admit that this set-off could be claimed at law, or that there is in this respect any material difference between our act of assembly and the Stat. 2 Geo. II, Ch. 22. But whatever difference does exist, is against the set-off, our act having regard to cases where a balance may be recovered by the defendant, and it cannot be said that partners may recover a debt separately due to one of them. But I throw this out only as my own opinion, and as we all agree that the debt due by Stewart to Coulter was a proper subject for equitable defalcation, I shall rest the opinion of the court on that ground alone."

Cochran v. Cutter, 18 Pa. Super. Ct. 282 (1901)

In this case the surviving partner of a firm composed of two persons engaged the plaintiff, one of their customers who was indebted to them, to work for a new firm formed to carry on the business after the death of his co-partner. The persons constituting the new firm were the surviving partner, the widow and the sole heir of the deceased partner. The question was whether they could set off the plaintiff's debt to the old firm against his claim against the new firm. At page 284 Judge RICE says:

> "Accordingly it has been held repeatedly in Pennsylvania although the rule seems to be different in some of the other states of the Union, that two or more defendants jointly sued may set off a debt owing by the plaintiff to one of them:"

The foregoing three cases were cited by the Supreme Court of Pennsylvania in the case of *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477 (1918) at page 482. They were distinguished but in no manner criticized and it may, therefore, be taken that they still represented the views of the Supreme Court of Pennsylvania. There are no later cases.

5. THE FEDERAL COURTS WILL GIVE WEIGHT TO STATE COURT DECISIONS IN DECIDING A QUESTION OF GENERAL LAW

The 34th Section of the Judiciary Act of 1789 provides:

> "That the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

In the early case of

Swift v. Tyson, 41 U. S. 1 (1842)

this Court announced the doctrine that this section of the Judiciary Act applies only to the statutes of the States as construed by their courts and to purely local matters, such as the title to real estate and that the so-called common law or decision law of the States on matters of general law is not binding upon the federal courts.

This case has been the subject of an enormous amount of controversy and it is now generally

recognized that the decision was probably wrong. It has never been overruled, is still sometimes cited, and very frequently distinguished.

There is an article of some 83 pages in length in

37 Harvard Law Review, 49

This article refers to the original documents to which Justice STORY, who wrote the opinion in Swift v. Tyson, did not have access, and shows that if he had known the facts back of the drafting of Section 34 his decision would have been otherwise. The article states, at page 52:

> "Had Judge STORY seen this original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was."

and at page 85:

> "It now appears from an examination of the Senate Files, however, that if Judge STORY and the Court had had recourse to those Files in preparing the decision in Swift v. Tyson, it is highly probable that the decision would have been different, and that the word 'laws' in Section 34 would have been construed to include the common law of a State as well as the statute law. This conclusion will probably be reached by anyone who examines the original slip of paper on which

the amendment containing Section 34 was written, and which is, with little doubt, in Ellsworth's handwriting."

Professor Beale, in his new book

The Conflict of Laws, Vol. 1, page 25, section 3.5 (1935)

says, concerning the decision in Swift v. Tyson, at page 26:

"This decision, unfortunate in that it unsettled the minds of lawyers as to the law and thus made it difficult to advise clients, was nevertheless quite within the right of the court; the federal court in the state was given by the Constitution of the United States as full power to declare the law, as the state court. The law thus declared was of course the law of the state, but the way in which it was decided, the weight given by the court to the decisions of courts, and especially of federal courts, in other states, led lawyers to apply the name of 'federal common law' to the doctrine.

This phrase 'the Federal Common Law' leads to a natural assumption that there is a law of the United States parallel to the law of the states and administered by the United States courts. This common law is supposed to be a law of the United States on almost

every point which is administered by the federal courts. This led to a curious controversy both of courts and of periodicals as to the possibility of such a law. After the controversy had subsided legal thought went on as usual and the Supreme Court of the United States decided that there was no such thing as a law of the nation apart from the laws of the states."

Since Swift v. Tyson has not been definitely overruled, it is impossible to find decisions in lower courts which directly criticize it. They merely avoid it in many cases. The real criticism is to be found in some of the dissenting opinions to decisions of this Court. One of these is found in the case of

Black & White Taxicab and Transfer Company v. Brown & Yellow Taxicab and Transfer Company 276 U. S. 518 (1928)

In this case a Taxicab Company had a contract with the Railroad Company giving the Taxicab Company the exclusive right to serve a particular station. The question was whether this contract was enforceable. Under the law of the State of Kentucky, where the station was, the contract would have been held invalid. This Court held that the question of the validity of the contract

was a matter of general law and disregarded the state decisions. Justice HOLMES filed a dissenting opinion in which Justices BRANDEIS and STONE joined.

The fallacy back of Swift v. Tyson was discussed in the following language, at page 533:

> "If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is. The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law.
>
> * * *
>
> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that

there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

and at page 534:

"If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. * * * I see no reason why it should have less effect when it speaks by its other voice. * * * If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain."

and at page 535:

> "Mr. Justice STORY in *Swift v. Tyson,* 16 Peters, 1, evidently under the tacit domination of the fallacy to which I have referred, devotes some energy to showing that Sec. 34 of the Judiciary Act of 1789, c. 20, refers only to statutes when it provides that except as excepted the laws of the several States shall be regarded as rules of decision in trials at common law in Courts of the United States. An examination of the original document by a most competent hand has shown that Mr. Justice STORY probably was wrong if anyone is interested to inquire what the framers of the instrument meant. 37 Harvard Law Review, 49, at pp. 81-88.
>
> * * *
>
> "I should leave Swift v. Tyson undisturbed, as I indicated in Kuhn v. Fairmont Coal Co., but I would not allow it to spread the assumed dominion into new fields."

The suggestion of Justice HOLMES of limiting Swift v. Tyson has been adopted by many cases, and the rule has grown up that while the federal courts are not bound by state decisions upon matters of general law they will give weight to them in order to avoid conflict as far as possible.

This rule is stated in

25 Corpus Juris, Page 846, Section 185

as follows:

> "If a question depends upon principles of general jurisprudence, or rests upon general or commercial law, the federal courts will decide for themselves and are not bound by state decisions. But although such courts are not absolutely controlled by state decisions, yet they will give weight thereto if they are called upon to construe the general commercial law of a state upon a new question, and they will also act upon principles of comity, to avoid conflict as far as possible, without sacrificing their own dignity, and in case of doubt may for the sake of harmony lean toward the views of the state court."

A great many cases are cited for the latter proposition. It is impractical to brief all the cases upon the subject. The following are in point and themselves cite many other cases to the same effect:

Sim v. Edenborn, 242 U. S. 131 (1916)

In this case a question of general commercial law came up for decision. The Circuit Court of Appeals for the Second Circuit declined to follow

the decisions of the New York state courts. In reversing this position, Mr. Justice McReynolds discusses the effect to be given to the decision of the state courts, at page 135:

> "This court has many times considered how far federal tribunals, when undertaking to enforce laws of the States, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess v. Seligman,* 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence the former exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' This has been often reaffirmed."

Nine decisions by this Court are cited immediately following this quotation.

Trainor Co. v. Aetna Casualty & Surety Co. 290 U. S. 47 (1933)

In this case the holder of a mortgage took a bond to assure the completion of a building upon the mortgaged premises. The building was not erected and the question was the measure of damages against the bonding company. The courts of

Pennsylvania have stated that under such circumstances the measure of damages is the cost of the building, notwithstanding the mortgage was adequately secured without the building. The trial court refused to follow this rule and allowed nominal damages only. The decision was affirmed by the Circuit Court of Appeals for the Third Circuit. This Court reversed the decision and held that the decisions of the Supreme Court of Pennsylvania should be followed. In limiting the rule of Swift v. Tyson, Mr. Justice SUTHERLAND states as follows at pages 54-55:

> "The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt.' *Burgess v. Seligman*, 107 U. S. 20, 33-34. And see *Sim v. Edenborn*,

242 U. S. 131, 135, where the authorities are collected; *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is 'balanced with doubt,' for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right."

As shown by the footnote to the citation from Corpus Juris a very great many cases could be cited to the same effect.

Turning to the case at bar we find the rule in Pennsylvania settled by decisions of long standing. The federal rule, it is contended by Petitioner should be different. The federal cases are in accordance with the decisions of the courts of Pennsylvania.

It is submitted, therefore, that whether or not Swift v. Tyson is still in effect the decision below was correct and should be affirmed.

6. ALLOWANCE OF THE SET-OFF IS IN ACCORDANCE WITH ORDINARY FAIRNESS

It has already been shown in this brief that if the bank had desired to recover upon the partnership notes, it could have sued either of the partners or both of them. In this way it could immediately have secured satisfaction out of the deposits of each of the individual partners or out of any other assets the individual partners might have owned. In Pennsylvania the result is no different than if the partners had signed the notes jointly and severally. After insolvency the Comptroller has taken the position that the partnership notes are joint notes and that a joint obligation is substantially different from a joint and several obligation. Therefore the Comptroller contends that there is no mutuality. In other words the obligation of the bank to the partners is not the same as that of the partners to the bank. There is no other answer to this proposition than that it is simply not the law of Pennsylvania. The question of whether a federal court of equity would allow this offset in a jurisdiction where a joint obligation is still a thing peculiar unto itself, really does not enter into this case at all. The real

question is whether there is any such thing as a joint obligation in Pennsylvania as distinguished from a joint and several obligation. The Petitioner's brief does not touch this point. Indeed the point is not arguable.

The substantial rights between the bank and its depositors and the partnership firm arise entirely out of the law of Pennsylvania. Whether or not Congress could have passed a partnership act applicable to those who deal with a national bank and whether or not Congress could have passed a statute prescribing the rights and remedies of persons whose names appear upon negotiable instruments deposited in a national bank is entirely beside the point. The mere fact that Congress has not passed such laws, coupled with the fact that all of the states do have such laws under which their citizens universally transact business, is sufficient argument to support the contention that the rights of the parties depend on state law and derive their sanction from it. Those rights do not spring from any national law.

In this case the notes were made in Pennsylvania, the bank had its place of business in Pennsylvania and the deposits were made in that state. All of the transactions involved took place in Philadelphia. It is submitted that necessarily the nature of the obligations which arose between the

parties as a result of their acts depends on the law of Pennsylvania.

As has already been shown the law of Pennsylvania is clear that there is no difference between a joint and a joint and several obligation. To say that there is a lack of mutuality is simply to ignore the facts. Whether or not there would be mutuality if the same acts were performed in Indiana or any other state is unimportant. Such acts when performed in Pennsylvania do result in mutuality. Statutes to that effect, already referred to, have been adopted in this Commonwealth.

The question, therefore, does not really arise in this case as to whether the federal court should have the same rule about set-off as has been so many times announced by the courts of Pennsylvania and by those of other states. It may be that in other states where a joint obligation is a peculiar thing the state courts and the federal courts may differ as to whether equity should allow the set-off in the case of insolvency of one of the parties. The foregoing pages of this brief have been devoted to show that the federal courts should allow the set-off even in such a case.

No one has asserted in this case that equity will refuse to allow set-off where there is mutuality. This seems to be an accepted proposition. In this case there was mutuality. Calling the obligation

of the firm a joint obligation is simply attaching a name to it which has one meaning in Indiana but an utterly different meaning in Pennsylvania. Under the meaning attached to this word in Pennsylvania, there is mutuality of obligation and the set-off should be allowed under the ordinary rule.

Any other result will do violence to the rights of both parties under the law of Pennsylvania. If we bear in mind that the bank could have sued either of the partners separately, it becomes clear that the bank would regard itself as amply secured against the partnership indebtedness by reason of the fact that one of the partners had on deposit in the bank a sum of money larger than the total of all the notes. It is an inescapable fact that the bank under the law of Pennsylvania was so secured just as effectively as if the deposit had been in the name of the partnership firm. Conversely, the partnership firm was able to borrow without security at this bank. Indeed one of the loans was made the day the bank failed. Making a loan under these circumstances was purely a matter of form. It was merely a matter of accounting between the partners. Under the law of Pennsylvania they would know that their individual deposits secured the loan made in the name of the firm.

As was stated in the case of *Scott v. Armstrong*, 146 U. S. 499 (1892) "where a set-off is otherwise

valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent."

The foregoing quotation clearly sets forth what each of the partners, or both of them together, and the bank would have said about the status between them on the day the bank closed.

It is submitted that there is no reason why the nature of the obligations between the parties as supported by the law of Pennsylvania should be disturbed because of the insolvency of the bank. The desire of the Comptroller of Currency to have a uniform rule is nothing more than an idle desire. Neither the National Banking Act nor any other act of Congress has said whether there is or is not mutuality under the circumstances of this case. The only law on the subject having any applicability is that of Pennsylvania and that law says there is mutuality and provides statutory procedure for enforcing it.

It would be entirely unfair and do violence to the substantial rights of the parties if this Court should deny set-off on the assumption that there is no mutuality.

Since the law of Pennsylvania has provided all the earmarks of mutuality under the circumstances here involved there is no reason why the

enforcement of those rights should be denied in a federal court of equity.

It is respectfully submitted that the decision below should be affirmed.

ROBERT T. MCCRACKEN
C. RUSSELL PHILLIPS
ISADORE KATZ
Attorneys for Respondents

APPENDIX

PENNSYLVANIA STATUTES

Act of 1830 P. L. 277 Section 1; 12 PS Section 801

"In all suits now pending or hereafter brought in any court of record in this commonwealth, against joint and several obligors, co-partners, promisors or the indorsers of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process, or judgment shall not be a bar to recovery in another suit against the defendant or defendants not served with process."

Act of 1830 P. L. 277 Section 2; 12 PS Section 802

"In all cases of amicable confession of judgment, by one or more of several obligors, co-partners or promisors, or the indorsers of promissory notes, such judgment shall not be a bar to recovery

in such suit or suits as may have to be brought against those who refuse to confess judgment."

Act of 1848 P. L. 536 Section 3; 12 PS Section 805

"Where a judgment shall hereafter be obtained against two or more co-partners, or joint or several obligors, promisors or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone."

Act of 1848 P. L. 536 Section 5; 12 PS Section 806

"Where a judgment shall be hereafter recovered against one or more of several co-partners, joint or joint and several obligors, promisors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably, or by adversary process."

Act of 1877 P. L. 52 Section 1; 12 PS Section 807

"Where judgment has been or may hereafter be obtained in any court of record of this commonwealth against one or more of several co-defendants, in default of appearance, plea or affidavit of defense, said judgment shall not be a bar to recovery in the same suit against the other defendants jointly, or jointly and severally liable as co-obligors, co-partners or otherwise."

Act of 1862 P. L. 167 Section 1; 59 PS Section 131

"Whenever any co-partnership firm shall be dissolved by mutual consent, or otherwise, it shall and may be lawful for any one or more of the individuals, who was or were embraced in such co-partnership firm, to make a separate composition or compromise with any one or all of the creditors of such co-partnership firm; and such composition or compromise shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred, by reason of his or their connection with such co-partnership firm, according to the terms of such compromise."

Act of 1862 P. L. 167 Section 5; 59 PS Section 135

"The above provisions in reference to co-partners of a firm shall extend to joint debtors, who are hereby authorized, individually, to compound or compromise for their joint indebtedness, with the like effect in reference to creditors and joint debtors of the individuals so compromising, as is above provided in reference to co-partners."

Act of 1923 P. L. 981 Section 1; 12 PS Section 685

"Whenever it is pleaded in any suit that two or more defendants are jointly liable for the cause of action specified, and, in the opinion of the trial judge, the evidence may not justify a recovery against some of them, the suit shall not be dismissed as to all, but the case shall be submitted to the jury, if the facts are in dispute, to determine which, if any of them, are liable, or, if the facts are not in dispute, the question of liability of any or all of them may be reserved for consideration by the court in banc, or the suit may be dismissed as to some and the trial proceed against the others, in every such contingency, with the same effect as if the defendants ultimately found to be liable were the only ones alleged to be so."

SUPREME COURT OF THE UNITED STATES.

No. 36.—October Term, 1937.

Joseph K. Willing, Receiver of Commercial National Bank, Philadelphia, Pennsylvania, Petitioner,
vs.
Israel Binenstock, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 6, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by respondents in a federal district court in Pennsylvania seeking to have allowed as a set-off against the indebtedness of the partnership firm of Swinger and Binenstock to the Commercial National Bank the amount of a deposit in the bank by Swinger, now deceased, and so much of a deposit by Binenstock as might be necessary to cancel the indebtedness. The bank was organized under the National Banking Act of the United States, and as such was engaged in business in Pennsylvania. On January 9, 1933, the partnership executed and delivered its promissory note to the bank in the sum of $10,000; and on February 28, 1933, executed and delivered to the bank its further promissory note in the same amount. Under date of January 25, 1933, one Luciano Cammarota executed and delivered to the partnership his promissory note for $300, which note was endorsed and discounted at the bank.

At the close of business on February 28, Swinger had on deposit in the bank the sum of $1,546.58, and Binenstock the sum of $32,323.76. At the same time, the partnership had on deposit the sum of $5,822.52. On that date the bank became insolvent and was taken over by the Comptroller of Currency, who appointed petitioner, Willing, receiver. Petitioner, when the suit was brought, had reduced the indebtedness of the partnership by allowing a set-off of the amount of the partnership deposit, but had failed and refused to allow as a set-off the amounts here in controversy.

Upon these facts the district court sustained the claim of respondents, 18 F. Supp. 262, and entered a decree allowing the set-off of the individual deposits against the joint indebtedness of the partnership, ordering a cancellation and return of the partnership promissory notes, and allowing a claim of Binenstock against the assets of the bank for the amount of his deposit, after making provision for the set-off. The decree also directed petitioner to endorse, without recourse, and deliver to Binenstock, the note of Cammarota for $300. Upon appeal, the court below affirmed. 88 F. (2d) 474. The decrees in both courts were based upon what was understood and declared by them to be the Pennsylvania rule upon the subject.

The case has been elaborately argued upon both sides; but, in respect of the partnership notes, we find it unnecessary to do more than consider and determine the question whether the courts below correctly stated the Pennsylvania law on the subject and were right in following it as the controlling rule of decision.

First. In *Miller* v. *Reed,* 27 Pa. 244, the Supreme Court of Pennsylvania held that, whatever distinctions otherwise would exist between joint contracts and contracts joint and several, these distinctions, under the statutes of the state, had been obliterated. These statutes, it was said (p. 249), "have taken away distinctions that were always embarrassing, and sometimes insuperable obstacles to the course of justice. There was no difference in the duty before, and none in the remedy now. The moral obligation is not affected by the words joint and several, and in Pennsylvania at least, the legal liability is not." It, therefore, makes no difference here whether the Swinger and Binenstock notes were joint, or joint and several.

In the opinion of the federal district court in this case, Judge Kirkpatrick said: "The law of the State of Pennsylvania, if applicable, would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. *Stewart* v. *Coulter,* 12 Serg. & R. (Pa.) 252; *Cochran* v. *Cutter,* 18 Pa. Super. 282. See also *Mintz* v. *Tri-County Natural Gas Company,* 259 Pa. 477." He held the law applicable and entered the decree accordingly. The court below affirmed on the authority of the opinion of the district judge.

Petitioner challenges this view of the district judge, albeit faintly. The judges of both courts below have had wide experi-

ence in the field of Pennsylvania law; and, even if the question were doubtful, as we think it is not, we should have little hesitation in accepting their determination as to the state law on the point here under consideration. We have, however, examined the decisions of the Pennsylvania courts, and fully agree with the courts below as to their interpretation.

Second. We have no occasion to consider whether § 721 of the Revised Statutes (28 U. S. C. § 725) is applicable.* Under *Swift* v. *Tyson* 16 Pet. 1, it would not be. That case has been much criticized, and the tendency of our decisions which have followed has been to limit it somewhat strictly. And one of the practical restrictions upon the principle of that case, which we have many times announced, is that, even where it applies, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." *Burgess* v. *Seligman*, 107 U. S. 20, 33-34; *Sim* v. *Edenborn*, 242 U. S. 131, 135, and authorities cited; *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47, 54-55; *Mutual Life Co.* v. *Johnson*, 293 U. S. 335, 340; *Community Bldg. Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678, 680. Even if there were a conflict between the decisions of the state and those of the lower federal courts, we should be free to apply the "harmony" rule and follow the state decisions. We are, however, unable to find any such conflict.

The case which seems most nearly in point is *Roelker* v. *Bromley-Shepard Co.*, 73 F. (2d) 618; and that case, so far as it goes, is in harmony with the Pennsylvania rule. There, the company was indebted to the Middlesex National Bank in the sum of $5,000 on a joint note signed by the company and Sarah Bromley Shepard. On the day the bank closed, the company had on deposit in the bank $5,611.10 and Sarah Bromley Shepard had on deposit the sum of $6,275.13. The court ordered that $5,000 of the $5,611.10 due from the bank to the company be set off against the $5,000 due from the company to the bank on the joint note, holding that where justice requires and there is no adequate remedy at law, as was the case there, a court of equity will order a set-off.

* Sec. 721. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

There is nothing in the National Banking Act or in any other federal statute which conflicts with the Pennsylvania rule. In the case of an insolvent bank, the National Banking Act, 12 U. S. C. § 194, simply provides for a "ratable dividend" on all proved or adjudicated claims. This court held in *Scott* v. *Armstrong*, 146 U. S. 499, 510, that the allowance of a valid set-off cannot be considered a preference, and that only the balance, after deduction of the set-off, constitutes part of the assets of the insolvent. "The requirement", the court said, "as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

Third. The reason for the order of the district court requiring the surrender of the Cammarota note for $300 is not clear, but the requirement seems to be erroneous. It does not appear from the record whether Cammarota was solvent or insolvent. If he was solvent, the partnership was not entitled to set off its deposits against its secondary liability as endorser of the Cammarota note. See *Williams* v. *Rose*, 218 Fed. 898, 900; *Bank of United States* v. *Braveman*, 259 N. Y. 65, 68, *et seq.*, and authorities cited. "To allow an indorser", the New York court said, pp. 70-71, "to set off his deposit when the maker is solvent and able to indemnify the indorser as in this case would enable the indorser to collect the full amount unpaid on the note from the maker and at the same time receive a larger amount of his deposit than other depositors. Such a result would be inequitable." An excellent statement in support of the foregoing view, and the reasons for it, will be found in the opinion delivered by Judge Parker in *Shannon* v. *Sutherland*, 74 F. (2d) 530, 531-532.

The facts are not sufficiently disclosed by the record to enable us to dispose of this item. The opinion of neither court deals with the subject, and respondents, neither in their brief nor oral argument, have had anything to say about it. In these circumstances, the case must be remanded to the district court for further consideration of the question, with authority, in its discretion, to take further evidence to that end. With that exception, the decree below is approved.

Reversed and remanded for further proceedings in conformity with this opinion.